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NO. 85-1941

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF MISSISSIPPI

Petitioner

VERSUS

LEO GREGORY NEALY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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SUMMARY OF ARGUMENT

Petitioner erroneously states that the United States District Court held "that even through the attorney for Respondent stated that his handling of the case would have been no different had he not been representing respondent's brother and co-defendant by counsel contained a 'conflict of interest which adversely effected counsel's performance'. (Citation omitted).

Such *was not* the holding of the District Court or the Court of Appeals below. The District Court found that the "record . . . clearly demonstrates an actual conflict of interest and such conflict adversely affected trial counsel's performance." (Petition Appendix p. D30) The Court of Appeals founds that there was "ample evidence" to support such and the District Court's finding was not "clearly erroneous". Petitioner basically request this Court to grant writ of certiorari to review the evidence and specific facts of this case and make a contrary factual finding than that of the District Court and Court of Appeals. *Contra. United States v. Johnson*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEAL HOLDING THAT:
(1) PROOF OF SOME ADVERSE EFFECT WAS REQUIRED BEFORE PREJUDICE COULD BE PRESUMED FROM A SHOWING THAT THE ATTORNEY HAS AN ACTUAL CONFLICT OF INTEREST IS IN ACCORD WITH THE COURT'S STANDARDS AS SET FORTH IN *STRICKLAND V. WASHINGTON* AND *CUYLER V. SULLIVAN.*

This Court clearly delineated three standards for determining whether a Defendant had received effective assistance of counsel within a Sixth Amendment context, under certain circumstances.

(1) "Presumed prejudice" - (e.g. denial of assistance of counsel)

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. (citations omitted) Prejudice in these circumstances is so likely that case by case inquiry for prejudice is not worth the cost.
>
> *Strickland v. Washington,* 80 L.Ed.2d at 696

(2) "Limited Presumption of Prejudice" (e.g. conflict of interest claims)

> One type of actual ineffectiveness claim warrants a *similar, through more limited, presumption of prejudice.* In *Cuyler v. Sullivan,* 446 U.S. at 345-350, 64 L.Ed.2d 333, 100 S.Ct. 1708, the Court held that *Prejudice is presumed when counsel is burden by actual conflict of interest.* In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability to trial courts to make early inquiry in certain

> situations likely to give rise to conflicts, (citation omited), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, *the rule is not quite the per se rule of prejudice* that exists for the Sixth Amendment claims mentioned above. *Prejudice is presumed only if the Defendant demonstrates* that counsel "*actively represented conflicting interests*" and "*that an actual conflict of interest adversely effected his lawyer's performance.*"
>
> *Cuyler v. Sullivan*, supra at 350, 348, 64 L.Ed.2d 333, 100 S.Ct. 1708; *Strickland v. Washington*, supra at 697; *Nealy v. Cabana*, 782 F.2d at 1362 (5th Cir. 1986).

(3) "Actual ineffectiveness claims" (e.g. deficiency in performance)

> . . . actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the Defendant affirmatively prove prejudice.

Strickland v. Washington, supra at 697.

Petitioner initially asserts to this Court in it's "Reasons for Granting the Writ" that the Fifth Circuit "has misconstrued this Court's ruling in *Cuyler v. Sullivan.*" Yet, Petitioner's sole argument in it's brief is directed at the factual determination by the District Court (affirmed by the Fifth Circuit) that "adverse affect had been shown." (Petitioner's brief p. 11) It is abundantly clear that the Petitioner requests this Honorable Court to grant Writ of Certiorari to review the evidence and specific facts as to the

credibility of the testimony of trial counsel at the evidentiary hearing below, and *not* question of construing the applicable law under *Cuyler* and *Strickland.*

Throughout these appellate proceedings Petitioner has continually represented that the District Court "held that even though the attorney for Respondent stated that his handling of the case would have been no different had he not been representing Respondent's brother and co-defendant that the representation by counsel contained a "conflict of interest which adversely affected counsel's performance." (Petitioner's Brief p. 6-7) This was *not* the holding of the District Court. (See Appendix D-Petition).

Petitioner's "Question Presented" basically requests this Court to accept part of the evidence at the evidentiary hearing in the District Court below and ignore the credible evidence contrary to the factual findings of said Court. The Third Court of Appeals analyzed the effect of a conflict of interest, such as in this case, in it's initial review of *Cuyler v. Sullivan,* 593 F.2d 512, as follows:

> For decisions not to offer evidence, or interpose objections, and so forth, may well be legitimate tactical decisions if made by independent counsel. If made by counsel with divided loyalties, *they are suspect* because *a reviewing court cannot reliably determine to what extent the decisions were based on legitimate tactical considerations* and to what extent they were the result of *impermissible consideration of the best interests of other clients.* (Emphasis added)

Id. at 520.

Respondent's Trial Counsel, upon being subpoenaed to the evidentiary hearing and accused of ineffective assistance of counsel and conflict of interest, was understandably defensive of his alleged "trial tactics". Trial counsel's cross-examination of Officer Frierson (Petition Appendix D6-7) can only be characterized as a "setting-up" Officer Frieerson for impeachment by calling the Co-Defendant to deny this critical evidence.

Q: Who told you that?

A: His brother, Michael Nealy.

Q: And he's in jail back here, and you're saying under oath that his brother told you that he lived at that address?

A: That's correct.

This testimony and cross-examination by Respondent's Trial Counsel was more than damaging to his defense, it resulted in his conviction, as is shown by the Mississippi Supreme Court's repeated reference to the same in its opinion. (Petition Appendix El-10).

The most credible evidence of Trial Counsel's actual conflict of interest and it's adverse effect on his performance was the "Answer to Complaint" filed by Trial Counsel before the Mississippi State Bar Association.[1] (Petition Appendix D14-16). Certainly the facts as stated therein demonstrate the conflict of interest under which Respondent's Trial Counsel labored, and that such adversely effected his performance, in defense of the Respondent. In light of the cross-examination of Officer Frierson, the

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[1] Respondent had filed a bar complaint against his trial counsel, however conflict of interest was not claimed in those proceedings.

critical evidence introduced thereby and the admissions of Respondent's Trial Counsel in his "Answer to Complaint" no other conclusion can be reached but that this actual conflict adversely effected Trial Counsel's performance. *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985).

The District Court below correctly held from *all* the credible evidence presented at the evidentiary hearing that "the record in this case clearly demonstrates as actual conflict of interest and such conflict adversely effected trial counsel's performance." (See Petition Appendix p. D-30) This Honorable Court need only review the cross-examination of officer Don Frierson by Respondent's Trial Counsel (Petition Appendix pp. D6-7); Trial Counsel's "Answer to Complaint" (Petition Appendix pp. D13-16) and Mississippi Supreme Court opinion (Petition Appendix pp. E1-10 and p. D-13) to determine that the District Court and the Fifth Circuit Court of Appeal correctly found that there was "ample support in the record" that Trial Counsel "actively represented conflicting interests and such adversely effected his performance."

The Fifth Circuit Court of Appeals further held that the District Court Findings were not "clearly erroneous". (Petition Appendix p. B16) *Krasnov v. Dinan*, 465 F.2d 1298 (3rd Cir. 1972); *Sullivan v. Cuyler*, 723 F.2d 1077 (3rd Cir. 1983).

The District Court and Fifth Circuit Court of Appeals correctly interpreted and applied this Honorable Court's holdings in both *Strictland v. Washington, infra.* and *Cuyler v. Sullivan, infra.* Counsel for the Petitioner did not attend the evidentiary hearings below, hence he did not have the opportunity to hear the evidence, observe the

witness and evaluate their credibility, as did the District Court in making its factual findings. Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent submits that, not only was the District Court's finding of an actual conflict of interest that adversely effected his lawyer's performance not "clearly erroneous" but such was clearly "alleged and proved" by the record in this case.

Petitioner clearly seeks a review of the evidence and factual findings of the District Court below by this Court under a supposed misinterpretation of *Cuyler v. Sullivan*, supra. by the Fifth Circuit Court of Appeals *and* the District Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Brief of Respondent in Opposition to:

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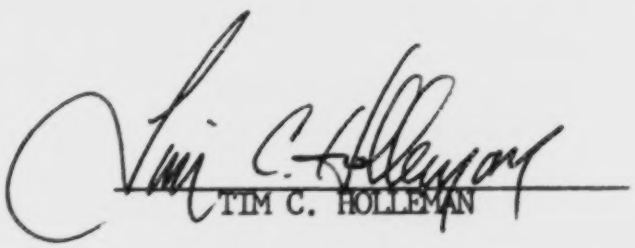
This the 24 day of July, 1986.



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